No. 83.

SEP 9 19

JAMES H. McKENNEY

Brief of Tarsney for D. E.

UNITED STATES OF AMERICA

Filed Sept. 9, 1901.

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1901.

EDWARD W. VOIGT,
Plaintiff in Error.

vs.

THE CITY OF DETROIT and THOMAS M. LUCKING, Receiver of Taxes for said City of Detroit,
Defendants in Error.

83

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR DEFENDANTS IN ERROR.

TIMOTHY E. TARSNEY, Corporation Counsel,
Attorney for Defendants in Error.

DETROIT:
THE THOS. SMITH PRESS, 42-44 LARNED ST., W
1901.

SUPREME COURT

OF THE UNITED STATES.

EDWARD W. VOIGT,
Plaintiff in Error.

vs.

THE CITY OF DETROIT, AND
THOMAS M. LUCKING,
Receiver of Taxes for said City of Detroit,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

The Plaintiff in error is the owner of certain real estate, situate in the city of Detroit. In the year 1898, proceedings were taken by the city in the Recorder's Court for the purpose of opening and extending Second Avenue, from the Grand Boulevard west to the northerly city limits; which proceedings resulted in a verdict that the opening of the street as contemplated in said proceedings, was a public necessity, and that it was necessary to take certain property in said verdict described for

that purpose, and awarding damages as compensation for the taking of said property to the amount of $73,732.68. That said verdict was duly confirmed by the court, and that a copy thereof and of the judgment of confirmation was transmitted to the Common Council of the City of Detroit, on the 14th day of June, 1898, and was referred to the Committee on Street Openings. On the 3d day of January, 1899, said Committee on Street Openings reported and recommended that $49,155.12 of said award be assessed on a local assessment district, and that the balance thereof be paid by the City of Detroit, and that, accordingly, a resolution was then introduced in and adopted by the said Common Council fixing and determining the property to be included in said assessment district, and including therein, the property of the Plaintiff in error and reciting that "it is hereby determined that the sum of $49,155.12 is a just proportion of the compensation awarded by the jury for the property taken for said improvement, which should be paid by the owners" of the property included in said assessment district, and resolved that that amount be assessed and levied upon the several parcels of said property, by the Board of Assessors of said city.

Record, p. 1.

In pursuance of said resolution, an assessment roll, assessing upon the several parcels of property embraced in said assessment district was prepared by the Board of Assessors of the City of Detroit, and transmitted to the Common Council on the 18th of April, 1899, and was afterwards, on May 9, 1899, confirmed by said Common Council; that by said assessment roll so confirmed, there is assessed upon and against the several parcels of property of the Plaintiff in error, sums amounting in the aggregate to the sum of $9,951.

Record, p. 2.

Plaintiff in error attacks such assessment, not upon the ground that any irregularity appears in the proceedings looking thereto, but solely upon the ground of the alleged unconstitutionality of the Act of the Legislature of the State of Michigan, under which such proceedings looking to the opening of said street were taken.

He alleges that he is advised, and verily believes that the provisions of the general street opening law for asssessment upon local assessment districts of amounts awarded as damages in condemnation proceedings or a portion thereof, being the provisions contained in section 3406 of the Compiled Laws of the State of Michigan, of 1897, are unconstitutional and invalid for the following reasons:

I. Because said law does not provide for giving to the property owners interested any notice of the proceedings of the Common Council for the determination of the limits of the local assessment district, and the amount or proportion of the award of the jury to be assessed thereon and does not provide for the giving to property owners interested notice of any hearing by such Common Council as to the amount of land to be included in such assessment district or the proportion of such award to be assessed thereon.

II. Because said law does not fix the basis upon which or the standard by which the Common Council are to determine what is the just proportion of the compensation awarded by the jury to be assessed upon the assessment district.

III. Because said law does not require that the amount of the award of the jury which the Common Council may order to be assessed upon such assessment districts shall not exceed the amount of the benefits derived by the land in said district from the improvement to pay the expense of which such award was made.

IV. Because said law violates the provisions of the 14th article of amendments to the Constitution of the United States in that it provides for the taking of property without due process of law.

Record, pp. 2-3.

To the Complainant's bill of complaint, the Defendants demurred.

Record, pp. 5-6.

Afterwards, on the 15th day of August, 1899, said cause came on to be heard before the Honorable George S. Hosmer, one of the Circuit Judges of the Circuit Court for the County of Wayne, and a decree was entered therein in favor of the Plaintiff in error.

Record, pp. 6-7.

From this decree Defendants appealed to the Supreme Court of the State of Michigan, which said court, on March 27, 1900, filed an opinion reversing the decree of the court below, sustaining the validity of said law. The opinion of the Supreme Court of Michigan is printed in full in the record, pp. 7-12.

Whereupon, Plaintiff in error sued out a writ of error from this court.

The law under which these proceedings were had and which is involved in this suit, is "An Act to authorize cities and villages to take private property for the use and benefit of the public, and to repeal Act No. 26, Public Acts of 1882," being consecutive sections 3392 to 3415, Compiled Laws of Michigan, '97. The section referred to in the bill of complaint and alleged to be unconstitutional is section 15, of said act, which for the convenience of the court, I print in full:

Sec. 15. "When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an

appeal is expired, or, if an appeal is taken, on the filing in the court below of a certified copy of the order of the Supreme Court, affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the Common Council, Board of Trustees, or Board of Supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment; if any, of affirmance; and thereupon, the proper and necessary proceedings, in due course, shall be taken for the collection of the sum or sums awarded by the jury. If the Common Council, or Board of Trustees, or Board of Supervisors believe that a portion of the city, village or county in the vicinity of the proposed improvement, will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon, they shall, by resolution fix and determine the district or portion of the city (or) village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel, or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the Common Council, Board of Trustees or Board of Supervisors, shall be final and conclusive, and prima facie evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained

shall be and continue a lien on the premises on which the same is made, until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided, shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village or county. At any sale which takes place of the assessed premises, or any portion thereof, delinquent for non-payment of the amount assessed and levied thereon, the city, (or) village or county may become a purchaser at the sale."

ARGUMENT.

It will be observed that the Plaintiff in error does not contend that the proceedings had and taken by the Common Council and the Board of Assessors of the City of Detroit were not in accordance with the law; his contention being that the law itself is invalid because no provision is made therein for notice that the proceedings of the Common Council for the determination of the limits of the local assessment districts and the amount or proportion of the award of the jury to be assessed upon such district. Because the law does not fix the basis upon which or the standard by which the Common Council are to determine what is the just proportion of the compensation awarded by the jury to be assessed upon the assessment district, and because the law does not require that the amount of the award of the jury which the Common Council may order to be assessed upon such assessment district shall not exceed the total amount of the benefits derived by the land in said district.

The law does provide that "If the Common Council or Board of trustees or Board of Supervisors believe that a portion of the city, village or county in the vicinity of the proposed improvement will be benefitted by such improvement they may, by

an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited, and thereupon, they shall by resolution fix and determine the district or portion of the city, * * * * benefited and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein."

The total amount of damages for the taking of the property was $73,732.68.

The bill alleges that the Committee on Street Openings reported, recommending that $49,155.12 of said award be assessed on a local assessment district, and the balance thereof be paid by the City of Detroit, and that accordingly, a resolution was then introduced in and adopted by the said Common Council fixing and determining the property to be included in said district, * * * * and determined that the sum of $49,155.12 is a just proportion of the compensation awarded by the jury for the property taken for said improvement, which should be paid by the owners of the property included in said assessment district, and resolved that that amount be assessed and levied upon the several parcels of said real estate by the Board of Assessors.

See Section 2, Bill, p. 1.

Section 37, of title 11, of the charter of the City of Detroit, provides that "when the assessment roll is completed, said board (the Board of Assessors), shall give notice by at least five publications in the city paper that such roll is completed and will remain in their office for 12 days from the first publication of said notice." The Plaintiff in error concedes that he has an opportunity of appearing before the Assessors, but only upon the question of apportionment; and that he may show that his lot is assessed to an undue proportion, as compared with others, and nothing else."

The above I quote from the brief of the Plaintiff in error in the Supreme Court of Michigan, and in the opinion of the court, on page 8, it is said: "The notice required by section 37, chapter II, of the city charter, was duly given," so that this case resolves itself into the question whether the property owner is entitled to notice of the fixing of the assessment district and of the amount to be apportioned upon such district and what portion of the award shall be apportioned to such district and what portion to the city at large.

It seems to me that these questions have been so often presented and passed upon by this Court that the rule should be well understood.

In Davidson vs. New Orleans, 96 U. S., 97, the State of Louisiana passed an act providing for the drainage of certain territory, established an assessment district and apportioned the cost of such drain upon the property within such district. This was assailed as being in violation of the constitutional provision that no state can deprive any person of life, liberty or property without due process of law.

Mr. Justice Miller, in delivering the opinion of the court, said: "Whenever by the laws of a state, or by state authority a tax assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state or of some limited portion of the community, and those laws provide for the mode of confirming and testing the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate in the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due processof law, however obnoxious it may be to other objections. * * * * It is said that part of the property of the Complainant is not benefited by this improvement, but this is a matter of detail, with which this court cannot interfere."

In County of Mobile vs. Kimball, 102 U. S., 691, the legislature of Alabama created a Board of Commissioners for the improvement of the harbor, river and bay of Mobile, and provided that the expense thereof should be borne by the County of Mobile. It was urged against this legislation that the work was a benefit to the whole State, and objection was raised to the act for that reason.

The court said: "Assuming this to be so, it is no objection which destroys its validity. When any public work is authorized, it rests with the Legislature, unless restricted by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It might apportion the burthen ratably among all the counties or other particular subdivisions of the State, or the whole or greater share of the whole upon that county or portion of the State, specially or immediately benefited by the expenditure. It may be that the act in imposing upon the County of Mobile the entire burthen of improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would be more just to the people of the county if the Legislature had apportioned the expense of the improvement, which was a benefit to the whole state, among the different counties, but this court is not the harbor in which the people of a city or county can find refuge from ill-advised, unequal and oppressive legislation. The judicial power of the federal government can only be invoked when some right under the constitution, laws or treaties of the United States is invaded. In all other cases, the only remedy of the evils of the people which rests with the people, must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation as far as practicable and be more mindful than their predecessors of the public interest."

In Hager vs. Reclamation District No. 108, 111 U. S., 701, the Legislature of California established a general system for

reclaiming swamp and over-flowed lands in the state. It provided for the formation of reclamation districts to be established by the Board of Supervisors of the county in which the lands or the greater part of them, were situated. The supervisors were then to apportion three commissioners to jointly view and assess upon each acre to be reclaimed or benefited, a tax proportionate to the whole expense and to the benefits which will result from the work.

The court, in passing upon the objections to the validity of this act, said: "The expense of such works may be charged against the parties specially benefited and be made a lien upon their property; all that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefits received. Absolute equality in imposing, however, may not be reached, only an approximation to it may be attainable; if no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is no valid objection to the mode pursued that to some extent inequalities may arise. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the Legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation or by laying the burthen upon the district specially benefited by the expenditure."

In this case it was contended (as here), that inasmuch as no notice was provided for or given, that the act was void, and that the taking of property thereunder did not constitute due process of law. Upon this proposition, the court said: "Undoubtedly when life and liberty are involved due process requires that there may be a course of judicial proceedings which imply that the party to be affected shall have notice and an opportunity to be heard, so also, where title or possession of property is involved. But where the taking of property is in the enforce-

ment of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which the amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in Davidson vs. New Orleans: 'In judging due process of law, respect must be had to the cause and the object of the taking, whether under the taxing power, the power of eminent domain, the power of assessment for local improvement, or some of these, and if found to be suitable or admissable in a special case, it will be adjudged to be due process of law, but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.' "

In Spencer vs. Merchant, 125 U. S., 345 (31763), an assessment for the expense of regulating, grading and preparing a street for travel was laid upon the lands lying within 300 feet of each side, which, in the judgment of the commissioners, would be benefited by the improvement. The original assessment was set aside because the statute provided no means by which the owners might have notice or an opportunity to be heard in regard to the assessment for grading and preparing the street for travel. Subsequently, the Legislature directed a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expense of making that assessment and interest since, to be levied and equitably apportioned by the supervisors upon and among those lots, after public notice to all parties in interest to appear and be heard upon the question. The said portion of that sum was levied and assessed accordingly upon these lots, one of which was owned by the Plaintiff in this action.

"The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned."

Mr. Justice Gray, in the opinion, said that, "Each of these things was within the power of the Legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. Citing within approval, Litchfield vs. Vernon, 44 N. Y., 123; People vs. Brooklyn, 4 N. Y., 427; People vs. Flagg, 46 N. Y., 405; Horn vs. New Lots, 83 N. Y., 100; Cooley on Taxation, 450. The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881 the legislature imposes the unpaid portion of the expense and cost, with interest thereon upon that portion of the property benefited which has thus far borne none of the burden. In doing so, it necessarily determines two things, namely, *the amount to be realized, and the property specially benefited by the expenditure of that amount.* The lands might have been benefited, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit, and the property to which it extends is, of necessity, a question of fact, and when the Legislature determines it in a case within its general power, its decision must, of course, be final. We can see in the determination reached, possible sources of error, and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881, was imposed without reference to special benefits.

The Legislature properly determined that the lands described in the act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense, and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot, for that reason, question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes. Citing, Weisner vs. Douglas, 64 N. Y., 91. Certainly if the acts of '69 and '70 had never been passed, but the improvement of Atlantic avenue had been ordered, the Legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically, just that was done in this case. * * * * The Legislature, in the exercise of its power, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading and repairing of a street, to be assessed upon the owners of lands benefited thereby, and the determination of the territorial district which should be taxed for local improvement is within the province of legislative discretion. * * * * In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement and order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which should receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both these facts to the judgment of commissioners."

In this case, it was complained that the act did not give the land owners an opportunity to be heard as to the original apportionment, although it did give them opportunity to raise all pertinent and available questions, and dispute their liability as to its amount and extent. The court, in speaking of this objection, said: "That objection becomes a criticism upon the action of the Legislature, and the process by which it determined the amount to be raised, and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The Legislature determines the expenditures and the amounts to be raised for their payment, the whole discussion and all questions of prudence, propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case, it kept within its power, when it fixed, first the amount to be raised to discharge the improvement debt incurred by its discretion; second, when it designated the lots and property which, in its judgment, by reason of special benefits, should bear the burden."

Again, "When the determination of lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands *are benefited and how much, but the Legislature has the power to determine, by the statute imposing the tax, what lands which might be benefited by the improvement are, in fact, benefited, and if it does so, its determination is conclusive upon the owners, and the courts and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited.*"

Walston vs. Nevin, 128 U. S., 578 (544), was error to the Court of Appeals of Kentucky to review a judgment directing the enforcement of a lien for an assessment for a local improve-

ment in the city of Louisville. The act under which the proceeding was taken provided that, "When the improvement is the original construction of any street, road, lane or alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the Central Council, according to the number of square feet owned by them, respectively, except that corner lots * * * * shall pay 25 per cent more than others for such improvement. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square."

"Sec. 4. When an improvement in public ways shall have been made, * * * * and the contract therefore completed, the city engineer shall, by one insertion in one of the daily newspapers published in Louisville, give notice of the time and place fixed for the inspection and reception of the work by the city engineer or either of his assistants or deputies, and such owners or their agents or representatives may appear and be heard before such engineer or his assistant or deputy, as to *whether such improvement shall have been made in accordance with the ordinance authorizing the same and the contract therefore.*"

It will be observed that no provision was made for a hearing upon the question of the necessity of the improvement, the taxing district or the extent of the tax to be raised and levied upon the different parcels.

In this case, the court follows Davidson vs. New Orleans, 96 U. S., 104, and in commenting thereon, Mr. Justice Fuller says: "And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the lands assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards benefits conferred, nor that

personal judgment was rendered to the amount assessed, are matters in which state authorities are controlled by the Federal Constitution. Here the determination of the taxing dstrict and the manner of the apportionment are all within legislative power. Citing, Spencer vs. Merchant, 125 U. St., 345; Stanley vs. Alban, 121 U. S., 550; Mobile vs. Kimball, 102 U. S., 691; Hager vs, Reclamation Dis., 111, U. S., 701; United States vs. Memphis, 97 U. S., 284; Laramee County vs. Albany County, 92 U. S., 397. Whenever the law operates alike on all persons and property similarly situated, equal protection cannot be denied. Wertz vs. Hoagland, 114 U. S., 606; Richmond F. & P. R. R. Co vs. Richmond, 96 U. S., 529. The remedy for abuse is in state courts, for in the language of Mr. Justice Field, in Mobile vs. Kimball: "This court is not the harbor in which the people of a state can find refuge from ill advised, unequal and oppressive state legislation."

In Williams vs. Eggleston, 170 U. S., 305, Mr. Justice Brewer, speaking for the court, said: "Neither can it be doubted that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such districts, and what property shall be considered as benefited by a proposed improvement. And in so doing, it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is, in fact benefited."

In this case a portion of the cost of the purchase of a toll bridge over the Connecticut River, at the city of Hartford, was apportioned among five towns, designated by the legislature.

Parsons vs. District of Columbia, 170 U. S., 45, was a proceeding to test the legality of a special assessment made against the Plaintiff's land for a water main tax or assessment, for lay-

ing a water main in the street on which petitioner's land abuts. The act of the Legislative Assembly of the District of Columbia, June 23, 1873, provided, that, "Hereafter in order to defray the expense of laying water mains and the erection of fire plugs there be and is hereby levied a special tax of 1¼ cents per square foot on every lot or part of lot which abuts in or touches on any avenue, street or alley in which a main water pipe may hereafter be laid and fire plug erected." By act of Congress, August 11, 1894, it was provided that hereafter all assessments levied for laying water mains in the District of Columbia shall be at the rate of $1.25 per lineal front foot, against all lots or land abutting upon a street, road or alley in which a water main shall be laid. 28 St. at L., 275.

Mr. Justice Shiras delivered the opinion of the court, and held: "By this legislation a comprehensive system regulating the supply of water and the erection and maintenance of reservoirs and of water mains was established, and of this legislation every property owner in the district must be presumed to have notice. And accordingly, when by the act of August 11, 1894, Congress enacted that hereafter assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear foot against all lots or land abutting upon the street, road or alley, in which a water main was laid, such act must be deemed conclusive alike of the question of the necessity of the work and *of the benefits as against abutting property.*"

To open such questions for review on the petition of every or any property holder would create endless confusion. Where the Legislature has submitted these questions for inquiry to a commisssion or official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing or to notice or an opportunity to be heard."

The recent case of Wight vs. Davidson, decided April 29, 1901, Advance Sheets No. 14, June 1, 1901, was a street opening case in the District of Columbia. The act of Congress provided that of the amount found due and awarded as damages for and in respect of the land condemned, not less than one half thereof shall be assessed by the jury in such proceedings against the pieces and parcels of ground situated and lying on each side of the extension of said street, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as therein provided. The principal objections urged against the validity of the act, as stated by Mr. Justice Shiras, were first, because, as is alleged, it arbitrarily fixes the amounts of benefit to be assessed irrespective of the amount of benefits actually received or conferred upon the land assessed by the opening of the streets, and second, because it contains no provision for notifying the owners of the property to be assessed in advance of such assessment, or at any time pending the consideration of the cause by the jury.

The court here reviews the authorities hereinbefore cited, and held that the proceedings in that case constitute due process of law.

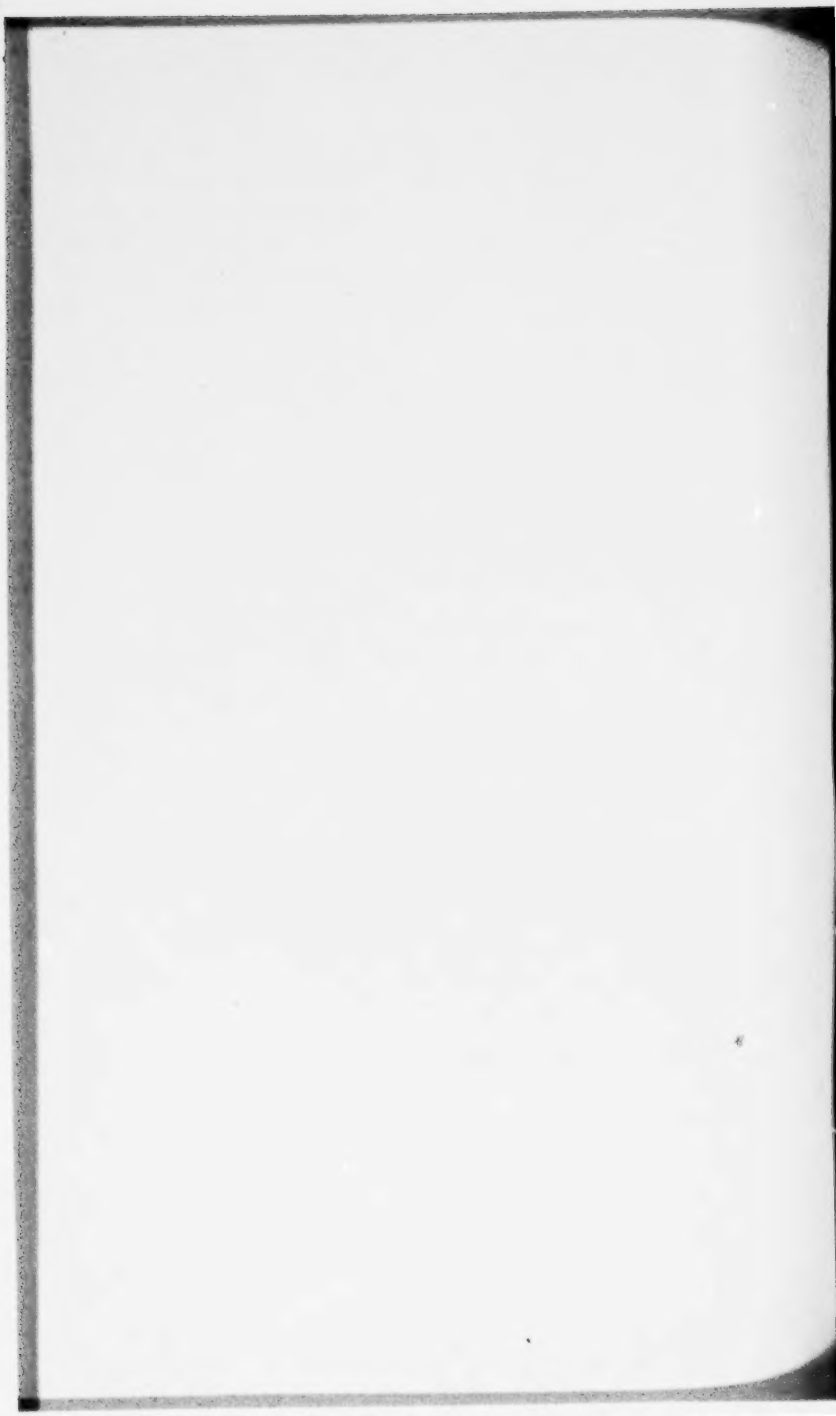
We have here, then a case arising under the laws of the State of Michigan, that has been declared constitutional by the highest court in that state,—a case where the Plaintiff in error had notice of the apportionment of benefits among the several lots and parcels of land embraced within the assessment district, and no complaint is made by him of any lack of notice in that respect or of other proceedings as not being in conformity with the provisions of law, and brings us within the rule laid down in the case of Cass Farm Co. Limited vs. the City of Detroit, decided by this Court, April 29, 1901, that Federal Courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state, applicable to all persons in like

circumstances and conditions, and is like the frontage assessment cases, where it was said in French vs. Barber Asphalt Co., that, "What was complained of was an orderly procedure under a scheme of local improvement prescribed by the Legislature and approved by the courts of the state, as consistent with constitutional principles."

I respectfully submit that the judgment of the Supreme Court of the State of Michigan should be affirmed.

TIMOTHY E. TARSNEY,

Corporation Counsel of the City of Detroit, Michigan,
Attorney for Defendants.



No. 83.

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JAMES H. McKENNEY,
Clerk

Brief of Joslyn for D. E.

SUPREME COURT

Filed Dec. 5, 1901.

OF THE UNITED STATES.

83.

EDWARD W. VOIGT,
Plaintiff in Error.

vs.

THE CITY OF DETROIT, et al.,
Defendant in Error.

No. 17,800

ERROR TO THE SUPREME COURT OF MICHIGAN.

BRIEF OF C. D. JOSLYN FOR DEFENDANT IN ERROR.

DETROIT:
THE THOS. SMITH PRESS, 42-44 LARNED ST., W
1901.

SUPREME COURT

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EDWARD W. VOIGT,
Plaintiff in Error,
vs.
THE CITY OF DETROIT and
THOMAS M. LUCKING, Receiver, Etc.,
Defendant in Error.

No. 17,800.

Error to Supreme Court of the State of Michigan.

BRIEF OF C. D. JOSLYN, OF COUNSEL FOR DEFENDANT IN ERROR.

STATEMENT.

In the year 1898, the City of Detroit took proceedings to open and extend Second avenue from the Boulevard north to the city limits, where the same was not already opened. In that proceeding damages for property taken were awarded to the amount of seventy-three thousand seven hundred thirty-two and sixty-eight one-hundredths dollars ($73,732.68). No question is or has ever been made as to the validity of this award.

In January, 1899, the Common Council, as it was bound in law to do, proceeded to make an assessment to pay said award. It was obliged to and did proceed under the following State statute:

> "If the common council or board of trustees or board of supervisors believe that a portion of the city, village or county, in the vicinity of the proposed improvement will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just portion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon, they shall, by resolution, fix and determine the district or portion of the city or village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement."
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> Compiled Laws Michigan, Sec. 3406.

In pursuance of this statute the common council of Detroit adopted a resolution determining the portion of the city which was benefited by the opening of Second avenue, which portion included the land of the plaintiff in error. The resolution recited that "it is hereby determined that the sum of forty-nine thousand one hundred fifty-five and twelve one-hundredths dollars ($49,155.12) *is a just proportion* of the compensation awarded by the jury for the property taken for said improvement." This amount was required to be paid by the owners of the property within the assessment district fixed in said resolution according to the benefits accruing to the property of each.

After the adoption of this resolution it became the duty of the board of assessors under the law to make the assessment roll, which it did. It assessed upon the owners or occupants of each lot, parcel or subdivision of land in the assessment district said amount of forty-nine one hundred fifty-five and twelve amount of forty-nine thousand one hundred fifty-five and twelve one-hundredths dollars ($49,155.12) in proportion "to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement."

The charter of the city requires that when an assessment roll is completed the board of assessors "shall give notice by at least five publications in the city paper that such roll is completed and will remain in their office twelve days from the first publication of said notice for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful correction of such roll, sign the same and report it to the Common Council. Said Council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections. And when the same shall be corrected to the satisfaction of the Common Council, it shall by resolution confirm the same."

Marginal Sec. 219, Charter and Laws City of Detroit.

It is conceded and this suit is founded on the assumption that the various officers of the city have in all these proceedings followed the statutes. In the absence of any complaint or allegation to the contrary, we may fairly assume that the assessment was actually made according to benefits.

PREFATORY.

It will be perceived that the case we have here is not one of actual wrong or injury.

There is no allegation that the plaintiff in error is wrongfully assessed and, therefore, it is fair to assume that he has not been. Yet he insists on having this Court relieve him of a burden which, under the facts as presented by the pleadings, is fairly and justly his to bear.

Although we may properly assume that the assessment of his property is in exact accordance with the benefits which it received from the public improvement ,which is the foundation of the tax, still this Court is asked to set it aside as a taking of property without due process of law.

It may be fairly asserted that there has *actually* been due process of law, yet this Court is asked to take up a purely academic question and say that *theoretically* there has not been due process of law.

Does such a case come within the intent and purpose of the Fourteenth Amendment to the Constitution of the United States?

Is such a question as the one proposed a federal question?

ARGUMENT.

The particular method of levying assessments to defray the cost of taking private property for public use, which is complained of in this case, has been a part of the taxing system of Michigan for eighteen years. The power to levy such assessments has been exercised in one way or another ever since Michigan became a State. Streets and highways have been opened, and assessments to defray the cost thereof have been levied on the property benefited.

For some reason or other the Legislature from the beginning has made a distinction, so far as cities and villages are concerned, in the manner of levying assessments for benefits accruing from improving a street or highway already opened and benefits accruing from opening a new street or highway. In the former case the Legislature itself has always fixed the taxing district and the amount to be spread thereon, while in the latter case it has always delegated that work to some local body or tribunal.

Various methods of determining or arriving at the benefits in street openings have been tried. The experiment of having them determined by the same jury that determined the necessity for the improvement and the amount of compensation for property taken, was tried and found to be unsatisfactory. Eighteen years ago that method was abandoned and the local legislature of the city, village or county was substituted for the jury as the tribunal to determine the benefits. This method seems on the whole to have been fairly satisfactory because the statute has remained ever since with very slight amendments. Other methods had been tried, but it is not necessary to repeat the details of them. Some effort, too, has been made to provide special acts for the larger cities, but, generally speaking, they have either been declared void by our courts or have been abandoned as unsatisfactory.

We make this brief statement just to show that the statute complained of is no new or sporadic attempt on the part of the State to put upon its statute books some untried method of levying special assessments, but that it is firmly imbedded in and a part of the taxing system of the State. Moreover, it is not now receiving the attention of the courts of the State for the first time. The validity of proceedings under it, including that of the assessments, has been questioned many times but has been affirmed and reaffirmed by the Supreme Court of the State

of Michigan. The precise question raised in this case has, we think, been several times considered by said Court.

Beecher vs. Detroit, 92 M., 268.
Smith vs. Detroit, 120 M., 553.
Voigt vs. Detroit, 123 M., 547.

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It is claimed by the plaintiff in error that the statute which he attacks requires three things to be done which, if done without notice to the taxpayer whose property is to be affected, results in taking his property without due process of law.

These three things are:

First. The Common Council must determine or fix generally the local taxing district.

Second. It must determine the gross amount which shall be spread upon such district.

Third. An assessment roll must be made which shall properly apportion the amount determined upon among the different parcels of land in the taxing district.

(We think the statement of the powers and duties of the assessing board is not sufficiently broad, as we hereinafter seek to show.)

It is further claimed and it may be admitted that fixing the taxing district involves a determination in a general way of what property is specially benefited by the improvement and correlatively what is not.

The determination of the amount to be spread upon the district, it may be admitted, necessarily determines the question of the amount of the benefits to the district, because there is no authority in a case like this to spread as a tax anything except the amount of benefits, which the property taxed has derived from the improvement.

It is also claimed that before these two questions can be determined, the taxpayer who is ultimately to be affected has a constitutional right to be notified of these proceedings and to be heard upon both of these questions. It is admitted by counsel for the plaintiff in error that the statute provides for a notice and a hearing of some kind, but he limits its meaning or scope to a notice and a hearing upon the narrow question of apportioning the whole tax upon the several parcel sof land in the taxing district; in other words, he limits it to a simple mathematical or arithmetical proposition.

The position of the plaintiff in error, re-stated, is this:

First. The statute requires the common council to determine the local taxing district which is benefited by the improvement.

Second. It must determine the whole or gross amount of benefits to be spread thereon.

Third. This amount must be apportioned among the several parcels of land benefited.

His proposition is that the taxpayer has the right to a notice of hearing upon all three of these proceedings.

This we deny.

I.

The question of fixing a taxing district and directing the amount of taxes to be spread thereon is a public question, in the consideration of which the individual taxpayer has no constitutional or inherent right to take part.

There is nothing so peculiar in a local or special assessment as to make it any different in *character* from any other assessment. Whatever else may be said, it is certainly an exercise of the power of taxation. Whether a tax shall be laid and what

property shall bear the burden of it are questions of public policy. Equally so is the question of how much shall be raised by taxation. Whether the amount raised is to defray the expense of maintaining public schools and building school houses or to defray the expense of creating a public highway, the principle by which the government is enabled to force the citizen to pay his share of the expense in either case is the same. There is of course a well recognized difference in some of the details of the proceedings, but this does not affect their character. A local assessment, like any other tax, is levied under the authority of the State and is "an enforced contribution to the public welfare." Like any other tax, it must be levied for a public purpose. These are the essentials of a tax and they are the basic principles upon which rests the power of taxation, and they limit it as well.

Being levied for a public purpose, it follows that the question, whether or not a tax should be levied, is a public one. What is to be the amount of the tax, is equally a public question, in the discussion and determination of which the individual taxpayer and citizen is wholly represented by the officers selected to examine and determine such questions. Although the individual taxpayer may and will be ultimately affected by the determination of these public questions, still it is the recognized doctrine of all our courts that having acted through or by his chosen representative, he is not entitled to act and be heard personally on such matters, but is bound by the acts of his representative. If that agent does not act wisely, the only remedy in many cases is to select other agents.

This Court, in the case of *Mobile Co. vs. Kimball*, 102 U. S., 691, has expressed itself better than we are able to do:

> "This Court is not the harbor in which the people of a city or county can find refuge from ill-advised, unequal and oppressive State legislation. The judicial power of the Federal Government can only be invoked when some right under the Constitution is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."

In the case of taxation the amount is to be determined by the necessities of the government, and is usually covered by the various appropriations which are made for such necessities.

No one has ever supposed that in the discussion of the appropriations by a legislative body, the individual taxpayer, not a member, has a right to be heard, although he will be vitally interested sometimes, if not always, in keeping down the amount of appropriations and consequent taxation. He is equally interested to see that the assessing officers include for taxation all property subject thereto, but it does not follow that he has a right to be heard on the question before the assessing officers. The reason is always because it is a public question to be settled and determined by the representatives of the people. The fact that the individual is to be ultimately affected does not change the character or nature of the question. We do not care to pursue this further. The proposition here contended for is fully demonstrated in the able brief of Mr. Tarsney and the cases therein cited. We are not aware that there is any decision of this Court holding a contrary doctrine.

But counsel seems to have taken the language used in *Fallbrook Irrigation District vs. Bradley*, 164 U. S., 112, and which has since been quoted with approval in *French vs. Barber Asphalt Company*, 181 U. S., 324, as a departure from a long line of decisions, but we do not so understand it.

This Court has always recognized that a hearing of some kind must be had before the State can constitutionally take a person's property for taxes—or to repeat the language quoted by counsel, that * * "parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage of the proceedings before the tax shall become an established charge against them or their property," but we do not understand that the language in the Fallbrook decision or of any other decision of this Court can fairly be claimed to go to the extent asserted by counsel. There is nothing in the language referred to that indicates to us that the taxpayer may be heard, except to complain of his individual assessment. It nowhere indicates that he is to take part in the discussion of the general proposition of fixing the taxing district or determining the gross amount of benefits to be spread thereon.

In the case of *Paulsen vs. Portland*, 149 U. S., p. 30, this Court said, at page 39:

> "By ordinance 5068 it ordered the construction of a sewer and directed what area should be drained into that sewer and created a taxing district out of that area. *For these, no notice or assent by the taxpayer was necessary.*" * * *

"By the same ordinance the city also provided that the cost of the sewer should be distributed upon the property within the sewer district and appointed viewers to estimate the proportionate share which each piece of property should bear."

"*Here for the first time in proceedings of this nature where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost, the taxpayer has a right to be heard.*"

We do not understand that the Fallbrook case, or any other decided by this Court, modifies the foregoing in any way.

Therefore we contend that the fixing of an assessment district and the determination of the gross amount of the tax to be spread upon that district are public questions in the consideration of which the individual taxpayer has no right to take part or be heard.

The plaintiff in error has not bee deprived of any right in this respect, and we think the principle that "those who enjoy the benefits shall equally bear the burden" should be applied to him.

II.

The statute under which the assessment was made affords to the property owner an opportunity to be heard on all questions which concern him individually.

Referring again to the statute or charter provision with reference to notice by publication, we find that when the assessment roll is completed, the board of assessors are required to give notice that the roll is completed and that it will remain in their office twelve days for the inspection of all concerned. At the expiration of that time the board are required, after any needful revision and correction, to sign and return the roll to the Common Council. The Council may refer it back to the board for further revision and correction. When it is corrected to the satisfaction of the Council, the latter shall confirm it by resolution.

This statute has been held by the Supreme Court of Michigan to give the taxpayer an opportunity to be heard, and our contention is that the opportunity to be heard means to be heard on all matters which concern him or his individual property.

Beecher vs. Detroit, 92 M., 268; see pp. 273, 274.

Upon page 271 will be found a list of the objections made there to the law now under discussion, and objection five there is the one which is made in this case. It reads, "The law does not provide that those specially taxed for benefits may be heard." The decision of the Court was that they might be heard. We think we might safely stop here with the assertion that when the Court said the taxpayer might be heard, it meant that he might be heard upon the question of benefits, because that was the objection raised. The fact that the same Court had already affirmed the doctrine "that parties whose property is to be taken under summary tax proceedings are entitled of right to be heard at some stage in the proceedings before the tax shall become an established charge against them or their property," we think adds force to our conclusion.

See *Thomas vs. Gain*, 35 M., p. 164.

But the language of the charter, although of itself strong enough to warrant the decision of the Court above referred to, is not all there is to be considered in this connection. Referring back again to Section 3406 of the C. L. of Michigan, we find that the duty imposed in making the assessment roll was to assess "upon the owners or occupants of such taxable real estate in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement." So that when the taxpayer under the notice of publication should go to the office of the board of assessors to inpect the tax roll, what was he to inquire about or object to? The answer must certainly be, the work of the board of assessors, which was to assess each man's property in accordance with the benefit which it had received from the improvement. In other words, it was open to him to be heard upon the question of whether or not his individual property had been benefited.

We think it should be borne in mind that Section 3406 does not put the duty of making this assessment roll upon the board of assessors. It is a general mandate which in terms is directed to the legislative body of the city, village or county, and it is only because of the charter provision that the board of assessors in the matter of making an assessment roll is substituted for the common council. Eliminating the board of assessors for the moment, it will be seen that the taxpayer would then go to the common council for a correction of his assessment, and we think we may fairly draw the conclusion from the peculiar wording of the charter provision, that the taxpayer may follow the tax roll back into the common council, but this conclusion is not necessary to sustain our general proposition.

It is impossible to give to the language of the charter provision its due and natural weight, unless we hold that it does mean that the taxpayer may be heard upon the question of benefits to him or his property. If the construction of the assessment roll is a mere mathematical or arithmetical problem, as counsel seem to claim, then what is the sense of sending the roll back and forth between the board of assessors and the common council for revision and correction? It seems to us that the language of the statute wherein it says, "Said Council may then confirm the same or may, when it shall deem necessary, refer the same back to said board for further revision or corrections," is rendered meaningless by the construction put upon it by counsel. "And when the same shall be corrected to the *satisfaction of the Common Council*, it shall by resolution confirm the same." Is it not clear that all this has reference to something more than a mere computation previously ordered by the common council?"

Let us see what the process is from the beginning.

First. The Common Council fixes the assessment district, describing it by metes and bounds.

Second. It determines the gross amount or benefit to be spread upon this district.

Third. By virtue of the charter it then turns the whole matter over to the board of assessors and by a defined rule fixes the amount of the assessment upon each parcel.

Now, what is that defined rule? Simply this:

> "The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate in proportion, as nearly as may be, to the advantage of which such lot, parcel or subdivision is deemed to acquire by the improvement."

Reading the statute, section 3406, and the charter provision together, is it not perfectly clear that the Common Council is to mark out in a general way an assessment district and after an assessment roll is made which reaches or touches the individual properties, then the owner may raise the question of benefits to his property; in other words, the question whether he is rightfully and properly assessed.

We do not see how there is any escape from the conclusion that this is the meaning of the decision of the State Supreme Court, and if it is, it must dispose of the matter.

We concede that the taxpayer has a constitutional right to be heard at some period upon the question of whether or not he has been properly or rightfully taxed, and we submit that the plaintiff in error has been heard or might have been heard on all matters touching the taxation of his property in the case under discussion. We submit further, that having had that opportunity and now being unable to say that he has been unjustly or unfairly assessed, he has no grounds or cause for complaint in this or any other court.

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